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No. 71-1268

In the Supreme Court of the United States

OCTOBER TERM, 1971

PAUL BROWN AND UNITED STATES TELEPHONE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1972. The petition for a writ of certiorari was filed on April 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case it was reversible error for the trial court to reserve decision

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on petitioner's motion for a judgment of acquittal after the government had concluded its case-in-chief.

2. Whether comments made by the government prosecutor in closing argument were justified by the evidence.

3. Whether portions of the district court's instruction on reasonable doubt constituted reversible error.

4. Whether the district court erred in refusing to give certain instructions tendered by petitioners.

STATEMENT

After a second jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of thirty-six counts of entering goods into the United States by means of false statements, in violation of 18 U.S.C. 542 and 2. Petitioner Brown was fined $1,000 on each of the thirty-six counts and sentenced to consecutive two-day prison terms on each count.[1] Petitioner United States Telephone Company was fined $100 on each of the thirty-six counts. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence at trial showed that petitioners Brown and the United States Telephone Co., a corporation which he principally owned and operated, had, on the thirty-six occasions specified in the indictment, imported decorator telephones into the United States by means of invoices containing false statements. During the period covered by the indictment Greenhill-Kato & Co., Ltd., a Japanese company, prepared at

[1] On March 22, 1972, pursuant to petitioner Brown's motion for reduction of sentence, the trial court reduced his fine to $350 per count, and suspended his prison sentence.

least two sets of invoices for each and every shipment of telephones sold by Greenhill-Kato to the United States Telephone Co., as the purchaser-importer (GX 2–37; Tr. 53–60, 89, 95, 167–168).[2] Greenhill-Kato would send both sets of invoices to petitioners, and, upon the entry of the telephones, petitioner Brown would submit the set of invoices reflecting a lower purchase price to his customs broker, who, in turn, submitted them to United States Customs (Tr. 162, 165–168, 218–219). Petitioners paid Greenhill-Kato for the merchandise by letters of credit based on the second set of invoices reflecting a much higher purchase price (GX 2–37; Tr. 193, 200–202). Since the higher priced invoices and letters of credit were never shown to Customs, duty was assessed on the bases of the lower false purchase price.[3]

ARGUMENT

1. Petitioners contend (Pet. 8–11) that the trial court's failure to rule upon their motion for judgment of acquittal at the end of the government's case was reversible error. At the time, however, no objection was made to the court's failure then to rule on the motion; petitioners simply proceeded to introduce evidence in their own defense (Tr. 278). In any event, as the court below pointed out, the evidence introduced

[2] "GX" refers to the Government's exhibits at trial; "Tr." refers to the trial transcript which we are lodging with the Clerk of this Court.

[3] While "value," and not "price," is the determining factor in assessing customs duty, an assessor gives great weight to price in determining value. Thus, in every instance involved in this case, the telephones were assessed at a value equal to the false purchase price submitted by petitioners (Tr. 44–48, 55).

by the government in its case-in-chief was sufficient to support petitioners' conviction (Pet. App. A–3). Accordingly, the fact that the judge did not enter an explicit ruling did not constitute prejudicial error. *Moore* v. *United States*, 375 F.2d 877 (C.A. 8), certiorari denied, 389 U.S. 844; *United States* v. *Godel*, 361 F.2d 21 (C.A. 4), certiorari denied, 385 U.S. 838; *Weathers* v. *United States*, 322 F.2d 566 (C.A. 9).

2. As the court below held (Pet. App. A–4), the record does not support the contention that the Assistant United States Attorney made improper comments in his closing argument. To be sure, the prosecutor argued in his summation that petitioner Brown had lied. But he did so only after referring to specific material and substantial facts to which Brown had testified on direct examination and which were directly contrary to prior statements that Brown had made, as revealed in letters introduced into evidence and in sworn testimony of other witnesses (Tr. 698, 699, 711 and 719–724). Similarly, the comment concerning petitioner Brown's integrity, character and motive to lie was based on the evidence adduced impeaching Brown's testimony (Tr. 698, 699, 711, 719–724). Thus, the challenged remarks were well within the scope of permissible comment. *Orebo* v. *United States*, 293 F.2d 747 (C.A. 9), certiorari denied, 368 U.S. 958; *Pritchett* v. *United States*, 185 F.2d 438 (C.A.D.C.), certiorari denied, 341 U.S. 905; *Davison* v. *United States*, 368 F.2d 505 (C.A. 9). Cf. *Stewart* v. *United States*, 247 F.2d 42 (C.A.D.C.).

3. Petitioners argue that a portion of the judge's charge on reasonable doubt was so misleading as to

constitute plain error. No objection was made at trial to the challenged instruction (Tr. 756–758, 774–777). And while the language in question is troublesome, we think that, when it is read in the context of the entire charge on reasonable doubt (*Parr* v. *United States*, 255 F.2d 86, 89 (C.A. 5), certiorari denied, 358 U.S. 824), the few words that are the focus of the present petition were not so prejudicial as to warrant overturning the conviction.

The trial judge, in explaining to the jury what is meant by a "reasonable doubt," stated first (Tr. 756–757):

> The words almost define themselves. Reasonable doubt is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It's a doubt which a reasonable person has after carefully weighing all the evidence, the kind of doubt which would make one hesitate to act. It means a doubt that is substantial and not merely shadowy. Reasonable doubt is one which appeals to your reason, your judgment, your common sense, and your experience. * * *

Following this statement, the court explained to the jurors that, if "after a fair and impartial consideration of all the evidence," they did "not have an abiding conviction of the defendants' guilt," their duty was to acquit (Tr. 757). Conversely, it instructed, if "you do have an abiding conviction of the defendants' guilt" (*ibid.*), your duty is to convict. During this portion of its instruction, the court attempted to define "abiding conviction," and it is here where the charge became, as the court of appeals stated (Pet. App. A–4), "gar-

bled." An "abiding conviction" is, the trial court stated (Tr. 757) on at least one occasion,[1] "such a conviction as you would be willing to act upon *even hesitatingly in importance* and weighty matters in the personal affairs of your own life * * *" (emphasis added).

The italicized phrase should, quite clearly, have been "unhesitatingly in important * * *." As given, it was misleading. The trial judge, however, did not end his instruction on reasonable doubt at this point, but added some clarifying remarks. He stated (Tr. 758–759):

> To put it more plainly, if you are confronted with an important decision in your own private affairs, and after reviewing all the factors that are pertinent you are beset by doubt and uncertainty and unsure of your judgment, then you have a reasonable doubt. But if, conversely, taking into account all the elements that pertain to the problem, you have no uncertainty, and have no reservation about your judgment, then you have no reasonable doubt.
>
> A reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that

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[1] Petitioners point out that the phrase "even hesitatingly" appeared twice in the charge on reasonable doubt; they complain (Pet. 15–18) that in the trial transcript before the court of appeals, the word "unhesitatingly" had been substituted for the questioned phrase in one, but not both, of the places it was used. While it is not clear who actually made the change, it seems fair to conclude that it was the trial judge who had the record corrected in accordance with his recollection of what he said. See Rule 10(e), Fed. R. App. P. Petitioners have made no showing here of "intentional falsification or plain unreasonableness" (*United States* v. *Mori*, 444 F.2d 240, 246 (C.A. 5), certiorari denied, 404 U.S. 913), and thus their objection to the change is not well taken.

> were the rule, few men, however guilty they might be, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty.
>
> In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.
>
> If the evidence in this case is susceptible of two interpretations, each of which appears to be reasonable, and one of which points to the guilt of the defendants, the other to their innocence, it is your duty under the law to adopt that interpretation or conclusion which will admit of the defendants' innocence and reject that which points to their guilt.

When the challenged phrase is considered with the instruction as a whole, we do not believe that the jury was misled by the judge's charge. See *Cohen* v. *United States*, 378 F.2d 751 (C.A. 9), certiorari denied, 389 U.S. 897. As the court of appeals properly observed (Pet. App. A–4), "the instruction as a whole, while longer than that usually given on the subject, fairly and accurately stated the principles by which the jury should be governed."

4. Finally, petitioners contend that the trial court should have charged the jury that "specific intent" was required to convict; also they urge that an instruction should have been given requiring the jury to find the making of a "fraudulent," as well as a false, invoice (Pet. 18–19).

But the record reveals that the charge clearly spelled out the three essential elements of the crime—*i.e.*, entry of merchandise into the commerce of the United States, use of a false or fraudulent invoice, and acting unlawfully, willfully and knowingly (Tr. 765–769). As the court of appeals held (Pet. App. A–4), "the elements of the crime and the necessity for proving fraudulent intent were adequately defined * * *."

Petitioners' additional contention that the trial court's failure to charge the jury on their claim of "good faith" is also insubstantial (Pet. 19–21). The court charged that the government must establish beyond a reasonable doubt that the defendants acted knowingly and willfully. It further explained that an act is done "knowingly if it is done voluntarily, and purposely and not because of mistake, accident, mere negligence or other innocent reason" (Tr. 767–768). In substance, then, the instruction covered petitioners' request regarding good faith.[5]

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[5] There is little merit to petitioners argument (Pet. 20) that they were entitled to an instruction that the jury could find the willfulness requirement had not been met if petitioner Brown honestly acted on the advice of counsel. There was no evidence that Brown relied upon, or took any action on, the advice of counsel. At best, his own testimony shows that the attorneys involved remained silent when witnessing a course of action that was fraudulent. Accordingly there was no basis for the requested instruction. See *Bisno* v. *United States*, 299 F.2d 711, 719–720 (C.A. 9); see also *Shale* v. *United States*, 388 F.2d 616, 618 n. 2 (C.A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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